IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW TOTH, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	No. 06-1617
BODYONICS, LTD., et al.	:	

MEMORANDUM

Ludwig, J. March 15, 2007

Plaintiffs move to remand this action to state court. Defendant General Nutrition Companies, Inc. moves to transfer to the Southern District of New York.[1]

In July 2002, plaintiffs filed a consumer class action complaint in the Court of Common Pleas of Philadelphia County, captioned Toth v. Bodyonics, Ltd., et al., CP Phila., July Term, 2002, No. 3886. The complaint alleges the deceptive and unfair marketing of "Steroid Hormone Products" as a legal and effective muscle builder, when the steroids, in fact, were "ineffective" for this purpose and, if effective, were "illegal." Complaint, Exhibit "A" to Notice of Removal, ¶ 4.

On April 17, 2006, GNC removed the action to this court as "related to" bankruptcy proceedings involving MuscleTech Research and Development, Inc., the manufacturer and supplier of the steroids at issue.[2] On the same date, GNC moved to transfer this case to the

[1] Plaintiffs are Andrew Toth and Richard Zatta, on behalf of themselves and all persons who have purchased Steroid Hormone Products within the State of Pennsylvania during the class period. Defendants are Bodyonics, Ltd., d/b/a Pinnacle, and General Nutrition Companies, Inc. Bodyonics has not filed an appearance.

[2] On January 18, 2006, MuscleTech filed for bankruptcy protection in the Southern District of New York under Chapter 15 of Title 11 of the Bankruptcy Code. The New York case

Southern District of New York.

GNC urges transfer to New York because the action is "related to" the MuscleTech bankruptcy. 28 U.S.C. §§ 157(a), 1334(b), 1409 and 1412. Additionally, the transfer would satisfy the interests of justice in that New York is the "home court" of the bankruptcy; it is judicially efficient to have all related cases in one forum; and a state court has no jurisdiction in a bankruptcy proceeding. Motion to Transfer, ¶¶ 11, 13, 15-18. Moreover, transfer to New York would be forum conveniens for the parties because all of them now travel there for the bankruptcy hearings and for other related cases already transferred to that jurisdiction.[3]

According to plaintiffs, the action should be remanded to state court because federal jurisdiction is lacking - MuscleTech is not a party in this action, and this action alone will not affect the administration of the bankruptcy. Memorandum in Support of Motion to Remand, ¶¶ 6, 7. In the alternative, if jurisdiction exists, abstention is appropriate because state law

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was removed to the United States District Court for the Southern District of New York and is pending at No. 06-Civ-538 (JSR) before the Honorable Jed S. Rakoff. Notice of Removal, ¶ 3. On May 31, 2006, counsel filed in this court a "Notice of Stay of Proceedings" referencing a stay issued in the bankruptcy case. Judge Rakoff directed that a copy of the order be filed in all product liability cases involving the "research, marketing, manufacture, sale and distribution" of products such as those involved in this case. Notice of Stay of Proceedings. Additionally, MuscleTech has commenced proceedings under Canada's Companies' Creditors Arrangement Act. A March 3, 2006 Call to Claims Order issued in that case identifies GNC as a Subject Party required to file a proof of claim. Memorandum in Opposition to Plaintiffs' Motion to Remand, Exhibit "B," pp. 5-6, 14.

[3] New Jersey and Florida district courts have transferred virtually identical cases to the Southern District of New York. Abrams v. General Nutrition Companies, Inc., U.S.D.C., D.N.J., C.A. No. 06-1820 (MLC), filed Sept. 25, 2006); Brown v. General Nutrition Companies, Inc., U.S.D.C., S.D. Fla., C.A. No. 06-80391-CIV-RYSKAMP/ITUNAC, filed Oct. 19, 2006).

issues predominate and transfer would prejudice plaintiffs. Memorandum in Support of Motion to Remand, ¶¶ 8, 9.

GNC replies that this case is "related to" the MuscleTech bankruptcy because GNC has a contractual indemnification claim for damages against MuscleTech.[4] Opposition to Motion to Remand, ¶¶ 6-10. Additionally, abstention and remand would not be in the interests of justice because of this action's relation to the MuscleTech case, and the ability of the New York court to comprehend all issues, including the state court claims. Opposition to Motion to Remand, ¶¶ 18-25. A further consideration is that this action has been pending in state court for nearly five years, discovery is not complete, and no class has been certified. Opposition to Motion to Remand, ¶¶ 26-30.

For the following reasons, GNC's motion to transfer will be granted; and plaintiff's motion to remand will be denied.

I. Jurisdiction

A party may remove an action "to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452(a). Section 1334, in turn, vests the district court with original jurisdiction "of all civil proceedings arising under Title 11, or arising in or

[4] The purchase order form GNC used to purchase MuscleTech products contains an indemnity clause. Memorandum in Opposition to Plaintiffs' Motion to Remand, Exhibit "A", ¶ 12 ("The Seller agrees to indemnify the Buyer from and against all liability, loss and damage including reasonable counsel's fees resulting from the sale or use of the products or any litigation based thereon, and such indemnity shall survive acceptance of the goods and payment therefore by the Buyer.")

related to cases under Title 11." 28 U.S.C. § 1334(a), (b)."Related to" jurisdiction exists where "the outcome of [the] proceeding could conceivably have any effect on the estate being administered in bankruptcy." This proceeding is alleged by GNC to be "related to" the MuscleTech bankruptcy because of the contractual indemnification agreement in the purchase order. See Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984).[5] However, not all indemnification agreements will necessarily create "related to" jurisdiction. In re Federal-Mogul Global, Inc., 300 F.3d 368, 382 (3d Cir. 2002); Steel Workers Pension Trust, 295 Bkrtcy. 747, 750 (E.D. Pa. 2003)("An indemnification agreement between a defendant and a non-party bankrupt debtor does not automatically supply the nexus necessary for the exercise of 'related to' jurisdiction. Only when the right to indemnification is clearly established and accrues upon the filing of the civil action is the proceeding related to the bankruptcy estate.")

Under this test, "related to" jurisdiction exists in this action. The language of the indemnification provision, supra, n.4, will create liability for the MuscleTech bankrupt estate if plaintiff prevails in this products liability case. There should be no need for a separate, subsequent indemnification action. Therefore, the outcome of this case will affect the MuscleTech bankruptcy. It is sufficiently "related to" the MuscleTech bankruptcy to establish jurisdiction under § 1334.

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[5] In Pacor, the court held that the dispute in question not to be related to the bankruptcy under this standard, and distinguished it from cases such as this one, in which an explicit indemnification agreement itself created liability for the bankruptcy estate. Id. at 995.

II. Abstention

"Upon a timely motion under 28 U.S.C. § 1334(c)(2), a district court must abstain if the following five requirements are met: (1) the proceeding is based on a state law claim or cause of action; (2) the claim or cause of action is 'related to' a case under Title 11, but does not 'arise under' Title 11 and does not 'arise in' a case under Title 11; (3) federal courts would not have jurisdiction over the claim but for its relation to a bankruptcy case; (4) an action 'is commenced' in a state forum of appropriate jurisdiction; and (5) the action can be 'timely adjudicated' in a state forum of appropriate jurisdiction." Stoe v. Flaherty, 436 F.3d 209, 213 (3d Cir. 2006). Here, requirement 5 is not met. The state court action has been pending for a number of years, and has not progressed very far. Therefore, mandatory abstention is not required.

Plaintiff also suggests discretionary abstention under § 1334(c), and equitable remand. The factors are the same for both: (1) the effect on the administration of the bankruptcy estate; (2) the extent to which state law issues predominate the action; (3) the difficulty or unsettled nature of the applicable state law; (4) comity with state courts; (5) the action's degree of relatedness to the main bankruptcy case; (6) the existence of a right to a jury trial; and (7) prejudice to the involuntarily removed parties. In re Mid-Atlantic Handling Sys., LLC, 304 Bkrtcy. 111, 126 (D.N.J. 2003). Here, because of contractual indemnity, this action directly affects the administration of the bankruptcy estate. While state law issues predominate, the law is well-settled and can readily be applied by a federal court. Given the

long history of the case in state court, with no resolution appearing imminent, remand would not necessarily result in a more expeditious conclusion of the case, and removal would not unfairly prejudice plaintiffs. Therefore, discretionary abstention and equitable remand are inappropriate.

III. Transfer

A district court may "transfer a case or proceeding under [the Bankruptcy Code] to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. Section 1412 applies to cases "related to" a bankruptcy proceeding. Howard Brown Co. v. Reliance Ins. Co., 66 Bkrtcy. 480, 482 (E.D. Pa. 1986). Section 1404(a) also permits transfer for the convenience of the parties and witnesses, or in the interest of justice, to another district where the case could have been brought. 28 U.S.C. § 1404(a). Here, too, the analysis under both sections is the same, the factors being: (1) plaintiff's choice of forum; (2) defendant's preference; (3) whether the underlying claim arose elsewhere; (4) relative physical and financial conditions of the parties; (5) convenience of witnesses; (6) location of books and records; (7) enforceability of any judgment obtained; (8) practical considerations making trial easy, expeditious or inexpensive; (9) administrative difficulty arising from court congestion; (10) local interest in controversy; (11) public policies in each forum; and (12) familiarity of trial court with applicable law. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-80 (3d Cir. 1995). Generally, the district where the bankruptcy is pending is the appropriate venue for all related proceedings. 1 Collier on

Bankruptcy ¶ 4.02 (15th ed. Rev. 2005).

Here, venue is proper in the Southern District of New York. Additionally, important factors weigh in favor of transfer - the practical considerations that facilitate making trial more expeditious and less expensive. Neutral factors include: a lack of purely local interest (given the widespread character of the issues involved); that the claims did not arise in this forum; the familiarity of the trial court with the law, in light of the frequent application by federal courts of state law and the settled nature of the law; the congestion of the New York court (not discussed by either party); the convenience of witnesses (also not discussed); and the location of books and records (Pittsburgh, GNC's headquarters, is not that distant from New York). Plaintiffs, who are Pennsylvania residents, will not be unfairly inconvenienced, given the proximity of Pennsylvania to New York. Accordingly, transfer is warranted in this case.

BY THE COURT:

/s/ Edmund V. Ludwig
Edmund V. Ludwig, J.

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ORDER

AND NOW, this 15th day of March, 2007, the "Motion to Transfer Venue to the Southern District of New York" filed by defendant General Nutrition Companies, Inc. is granted. "Plaintiffs' Motion to Remand" is denied. This action shall be transferred to the United States District Court for the Southern District of New York. The Clerk of the Court shall mark this action closed for all purposes.

A memorandum accompanies this order.

BY THE COURT:

/s/ Edmund V. Ludwig
Edmund V. Ludwig, J.